

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On February 8, 2010 appellant, then a 50-year-old enforcement assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained a carpal tunnel syndrome due to the repetitive duties of her position, which included moving boxes and organizing cabinets of legal folders. She first became aware of her condition and its relation to her employment on May 29, 2009. Appellant continued to work and used sick or annual leave for intermittent periods of disability.

In a decision dated May 7, 2010, OWCP denied appellant's claim. It found that the factual evidence of record did not establish specific employment factors that could have caused the alleged condition and that the medical evidence failed to demonstrate a diagnosed medical condition.

On June 29, 2010 OWCP received appellant's request for reconsideration. Appellant provided a detailed description of the work activities she performed from 2007 to 2009, which included emptying cabinets of legal folders, packing folders, loading boxes of folders onto the carrier, and unloading the boxes to another part of the office. She indicated that from 2007 to 2010 she organized boxes and folders and created an inventory list of over 700 folders and files as part of her duties. Appellant continued to submit progress reports from treating physicians, who noted appellant's symptoms, and diagnosed right carpal tunnel syndrome, but offered no rationalized medical opinion tying the condition to the employment factor.

By decision dated September 16, 2010, OWCP affirmed its May 7, 2010 decision with modification. It found that appellant had established work factors and had established a diagnosis of right carpal tunnel syndrome, but denied her claim on the basis of insufficient medical evidence to establish that her diagnosed condition was causally related to accepted factors of her employment.

On February 28 and July 26, 2011 OWCP received appellant's requests for reconsideration.

Appellant received treatment from Dr. Simon Lavi, an orthopedic surgeon. In a November 4, 2010 report, Dr. Lavi listed appellant's work duties as an enforcement assistant. He noted that appellant began to develop low back and bilateral hand pain in September or October 2007 and believed that her symptoms were a result of repetitive lifting of heavy files at work. Dr. Lavi reviewed the medical treatment that appellant received and noted that radiographic examination of appellant's bilateral wrists did not reveal any significant intra-articular abnormalities. Examination of appellant's bilateral upper extremities revealed positive palmar compression test subsequent to Phalen's maneuver, consistent with carpal tunnel syndrome. Dr. Lavi diagnosed lumbar discopathy and bilateral carpal tunnel syndrome and

² Docket No. 15-0989 (issued July 29, 2015).

opined that appellant's condition was related to her employment. In a July 8, 2011 supplemental report, he again reviewed appellant's employment duties and the physical requirements of her job. Dr. Lavi reiterated his opinion that appellant's carpal tunnel syndrome was related to her repetitive employment duties.

By decisions dated May 26 and October 24, 2011, OWCP denied modification of its prior decisions on the basis of insufficient medical evidence to establish causal relationship.

Appellant again requested reconsideration, which OWCP received on October 29, 2014.

In a June 11, 2014 report, Dr. Peter A. Lucero, a family practitioner, indicated that he had examined appellant for complaints of moderate-to-severe pain to the right wrist and neck pain radiating to the upper extremity. He noted that she was diagnosed with carpal tunnel syndrome seven years ago and now experienced depression and anxiety due to constant pain. Dr. Lucero provided examination findings and diagnosed hyperlipidemia, migraine without aura, major depressive disorder, and cerebral aneurysm. He recommended that appellant follow up at the office in two months.

Appellant was also treated by Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon. In reports dated September 24 and October 2, 2014, Dr. Tauber related that appellant began to work for the employing establishment in September 2007 as an enforcement assistant. He reviewed a detailed description of appellant's employment activities and reported that appellant was documented to have bilateral carpal tunnel syndrome, narrowing of the central canal and a disc bulge, and disc protrusion at L4/5 and stenosis at L4/5. Dr. Tauber opined that appellant's pathology was industrial in that she carried out extensive repetitive motion duties. He concluded that appellant had bilateral carpal tunnel syndrome and cervical radiculopathy with cervical stenosis and a disc protrusion as a result of her repetitive work duties.

By decision dated January 21, 2015, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to establish clear evidence of error.

Appellant appealed to the Board. In a decision dated July 29, 2015, the Board affirmed the January 21, 2015 OWCP decision.³

On August 19, 2015 OWCP received appellant's reconsideration request, through counsel. Counsel alleged that OWCP had erroneously determined that Dr. Lavi's July 8, 2011 report was not properly rationalized because Dr. Lavi did not provide specific details on appellant's work activities. Dr. Lavi explained that he had reviewed appellant's detailed statement of her work activities and he summarized those work duties on page 3 of his report. Counsel asserted that OWCP had not fairly read the evidence and, at a minimum, should have referred appellant's claim for further development of the medical evidence.

By decision dated January 28, 2016, OWCP denied appellant's request for reconsideration because it was untimely filed and failed to establish clear evidence of error.

³ *Supra* note 2.

LEGAL PRECEDENT

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, OWCP regulations provide that an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought.⁴ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁵

OWCP, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nonetheless undertake a limited review of the evidence previously of record to determine whether the new evidence demonstrates clear evidence of error.⁶ OWCP regulations and procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP. The evidence must be positive, precise, and explicit, and it must manifest on its face that OWCP committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹ The Board makes an independent

⁴ 20 C.F.R. § 10.607.

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (October 2011). OWCP procedures further provide that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.

⁸ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663 (1997).

⁹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁰ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it improperly denied merit review in the face of such evidence.¹²

ANALYSIS

In the last merit decision of appellant's case on October 24, 2011, OWCP denied appellant's occupational disease claim because she failed to submit probative medical evidence which established that her carpal tunnel syndrome was causally related to factors of her employment. As OWCP did not receive appellant's most recent request for reconsideration until August 19, 2015, more than one year after the October 24, 2011 merit decision, the Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. Consequently, appellant must demonstrate clear evidence of error on the part of OWCP in denying her claim for compensation.¹³

The Board notes that the subject matter previously reviewed by the Board in its July 29, 2015 decision, absent further merit review by OWCP is *res judicata*.¹⁴ In her August 19, 2015 reconsideration request, counsel raised a legal argument, contending that OWCP erred in finding that Dr. Lavi's July 8, 2011 report was based on an incomplete factual history because it lacked specific details about appellant's work activities. He asserted that OWCP had not fairly read the evidence and should have referred appellant's claim for further development of the medical evidence. The Board notes that OWCP had previously reviewed and ruled on Dr. Lavi's July 8, 2011 report and determined that it was insufficient to establish causal relationship. This report from Dr. Lavi was already part of the record reviewed by the Board in its July 29, 2015 decision.

To establish clear evidence of error, it is not sufficient merely to show that the evidence could be construed so as to produce a contrary conclusion. The term clear evidence of error is intended to represent a difficult standard.¹⁵ The Board has previously reviewed the case record and found no clear evidence of error in OWCP's October 24, 2011 merit denial of the claim. Appellant's reconsideration request fails to establish that OWCP committed an error in denying appellant's occupational disease claim and appellant has not otherwise submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's last merit decision. Accordingly, she has failed to establish clear evidence of error on the part of OWCP such that it erred in denying merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹² *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Matthews*, 44 ECAB 765 (1993).

¹³ *See Robert F. Stone*, 57 ECAB 292 (2005); *see also D.G.*, 59 ECAB 455 (2008); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁴ *See J.V.*, Docket No. 14-788 (issued October 19, 2015); *see also D.S.*, Docket No. 14-12 (issued March 18, 2014).

¹⁵ *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board